



25 February 2011

Committee Secretary
Senate Legal and Constitutional Committees
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Secretary,

Submission to the Senate Inquiry into the proposed Patent Amendment (Human Genes and Biological Materials) Bill 2010

Knowledge Commercialisation Australasia is the peak body representing organisations and individuals associated with knowledge transfer from the public sector. Our members include universities, government research organisations and departments, medical research institutes, rural research and development corporations and TAFEs. Members from CRCs and industry are also welcome, and we have strong links to counterpart professional associations internationally. Our focus is on helping develop best practice amongst our membership base and in helping to inform the broader public debate on matters of innovation and knowledge transfer from the perspective of our members. Accordingly we welcome the opportunity to provide comment on this issue. We note the many other contributions to this debate, and the commonality of the views we express with those of a number of others.

We acknowledge the concerns in the community about the potential negative impacts of patents on the ability of patients to access novel health care technologies. However, we believe that some of those concerns are misplaced and that the proposed bill inadvertently risks this very access to new methods of diagnosis and treatment. We also fear it might put Australia at risk of breaching its international obligations, negatively impacting on our relationships and economy.

We take a broad view of commercialisation, by no means restricted to a patent centric approach. Many of the most significant advances made by our member organisations are translated into benefit in the community through publication, knowledge sharing, open innovation, training and collaboration as well as other forms of applied research development. However, patents do play a valuable role in some situations with certain

technologies. Indeed, this is often the case in relation to the field of innovation in health care, where the very substantial costs involved in proving, developing, obtaining regulatory clearance and finally releasing new diagnostics and treatments to market mean that these innovations will only be introduced where those investing considerable sums of money in this process are able to progressively recover that investment (supported by the rights afforded by a granted patent). Further, without some form of protection such as that afforded by the patent system, we risk what is referred to as “the tragedy of the commons” – where because anyone can exploit new developments, no one will.

In respect of Australia’s international obligations, we refer in particular to those obligations in TRIPS Article 27.1 and to related provisions in bilateral commitments including those contained in the Australia-United States Free Trade Agreement. If the Bill is passed then KCA fear that Australia would be at risk of breaching those obligations. We leave further consideration of this to the Committee and others better placed to comment but note that the broader impact could be severe. From our particular perspective, KCA members are actively involved in the two-way exchange of knowledge-related assets between Australia and many other countries, including the US. Harming that exchange would have grave consequences for our own industry and our aspiration to become more of a knowledge based economy. In our view these considerations mean that any change in this area should be approached on a multilateral basis, not undertaken unilaterally.

Further, there are many existing mechanisms that exert controls on the ways in which people can obtain and exploit patent rights. In our opinion evolution in these controls is the most effective way to contain the potential for abuse of the system, rather than through enacting broad brush legislative change that would have direct negative consequences on a range of industries. These mechanisms include patent office practice, the review mechanisms, and ultimately the judicial system, all better placed to make appropriate judgments suitable to individual situations. Patent office practice for example has evolved considerably over the years in relation to the issue of “gene patents” (see eg the discussion in Lim, A and Christie, A. 'Reach-through Patent Claims in Biotechnology: An Analysis of the Examination Practices of the United States, European and Japanese Patent Offices', *IPRIA Working Paper*, No. 3/05 available at <http://www.ipria.org/publications/articles.html>).

Over the last century we have seen great advances in technology applied to benefit human life. But this is just the beginning of huge future potential, across all areas of endeavour. We are proud to represent members involved in pushing the boundaries of knowledge and in translating that knowledge into positive impact in the real world. Collectively we face many challenges and it is only through intelligently exploring and harnessing new approaches that we will best survive and thrive. Much of this work is best supported by an open culture and a sharing of information. But on occasion systems like that provided by the Patents Act play a vital role both in that aim and in enabling critical investment in the transfer of knowledge to tools and action. It would be

disappointing and detrimental if Australia chose to change policy settings in a way that meant we were cut off from participating fully in the promise of future developments.

In conclusion and summary: the Bill inadvertently risks the very things it seeks to support. KCA believes that if enacted the negative impacts would extend well beyond the fields of health, biotechnology, and agriculture into the broader economy. KCA also believes that there are a number of existing mechanisms (including patent office practice and the courts) that can be, and are, used to appropriately circumscribe the use of the patent system and avoid applicants stepping beyond its bounds to the detriment of the community.

We wish the Committee all the best in its further consideration of these important issues and in making recommendations about an appropriate response. We would be happy to provide further comment or information if that was helpful.

Sincerely

KCA Executive

Contact: Robert Chalmers, KCA Vice-Chair (Innovation Policy)